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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 857

DAVID GEORGE GWYTHER and KIP DALLEN MORGAN, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.....

DAVID GEORGE GWYTHER and KIP DALLEN MORGAN, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, David George Gwyther and Kip Dallen Morgan, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 4, 1970.

I. Opinions Delivered In Courts Below

The District Court did not write an opinion. The opinion of the Court of Appeals has not yet been reported; a copy of this opinion is printed in Appendix A hereto, *infra*, p. 18.

II. Jurisdictional Statement

The date of the judgment sought to be reviewed is August 4, 1970 and the time of entry is August 4, 1970. An order denying a rehearing was entered on September 16, 1970: a copy of this order is reprinted in Appendix B hereto, *infra*, p. 22. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is section 1254 of Title 18 of the United States Code.

III. Questions Presented

The questions presented for review are:

1. Whether petitioners had standing to make a First and Fifth Amendment constitutional challenge to that part of Section 462 of Title 50 Appendix of the United States Code that makes it a felony for any person knowingly to "hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of" the Selective Service Act or to conspire to do so?

2. Whether that part of Section 462 of Title 50 Appendix of the United States Code referred to in 1. above is unconstitutional on its face because of the First Amendment free speech guarantee and the Fifth Amendment due process clause?

3. Whether petitioners waived their rights to object to the sufficiency of an indictment purporting to charge a violation of Section 462 of Title 50 Appendix of the United States Code but omitting any reference to the words, "force or violence or otherwise," when they requested and received from the trial judge an instruction

requiring the trial jury to find "force or violence" before they could return a verdict of guilty?

4. Whether an indictment omitting the words, "force or violence or otherwise," or similar language was sufficient under Rule 7(c) of the Federal Rules of Criminal Procedure to charge a violation of Section 462 of Title 50 Appendix of the United States Code?

IV. Statute, Constitutional Provisions and Rule Involved

The statute of the United States the validity of which is involved is 81 Stat. 105, 50 App. U.S.C. Section 462 which reads, in pertinent part, as follows:

> "(a) . . . (A)ny person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title . . . or the rules or regulations made pursuant thereto, or who conspires to commit one or more such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine not more than $10,000 or by both such fine and imprisonment . . ."

The validity of this statute is to be determined under the following provisions of the United States Constitution:

> "
>
> Amendment I
>
> Congress shall make no law . . . abridging the freedom of speech . . .
>
> • • • • • •

Amendment V

> **No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."**

The sufficiency of the indictment in this case is to be determined under Rule 7(c) of the Federal Rules of Criminal Procedure which provides, in pertinent part, as follows:

> **"The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged . . ."**

V. Statement Of The Case

The jurisdiction of the United States District Court for the District of Oregon was based on 18 U.S.C. Section 3231.

On April 10, 1969 a Federal Grand Jury for the District of Oregon returned a three count indictment charging David George Gwyther and Kip Dallen Morgan with having violated Title 50 App., U.S. Section 462. In each of the first two counts the two defendants were charged with having knowingly and wilfully hindered and interfered with the administration of the Military Selective Service Act and with having attempted to do so. In count I the defendants allegedly had accomplished the charged hindrance and interference and attempt by interrupting and disrupting official activities of selective service personnel and by obstructing, restraining and stopping a local board by entering the offices of Local Board No. 14 in Roseburg, Oregon on January 8, 1969. In count II the defendants allegedly did the same thing a week later at Local Board No. 13 in Eugene, Oregon. Count III con-

tained allegations that the two defendants and others had conspired to commit the two substantive offenses alleged in the previous counts. (R. 1-3.)

This was not the first indictment against these two defendants that had been returned by this grand jury. Two months earlier, on February 7, 1969, the grand jury had returned a three count indictment containing identical charges with two differences, only one of which is important here: In each count of this, the original indictment, the grand jury had charged that defendants had hindered and interfered and had attempted and conspired to do so by "force and violence and otherwise." (A copy of this indictment is printed in Appendix C hereto, *infra*, p. 23.)

The government had pursued prosecution of the two defendants under the original indictment until March 18, 1969. On that date Federal District Judge John F. Kilkenny (now associate judge for the United States Court of Appeals for the Ninth Circuit) ruled, in response to defendants' motion to dismiss, that the words, "and otherwise," must be stricken from each count of that indictment. (See p 4 of Transcript of Proceedings printed in Appendix D hereto, *infra*, p. 27, 29.) Judge Kilkenny reasoned that the inclusion of the words, "and otherwise," raised "a Constitutional problem of extreme dimensions" which could only be avoided by limiting the government's case to one of force or violence. (See pp. 9-10 of Transcript of Proceedings printed in Appendix D hereto, *infra*, p. 30.)

Faced with an original indictment limited to "force and violence" the government went back to the grand

jury and obtained the superseding indictment under which these two defendants have been convicted. In the new indictment the government omitted any reference to the statutory language, "force or violence or otherwise." Again defendants moved to dismiss this indictment on the same grounds, the First and Fifth Amendments of the United States Constitution, which had led Judge Kilkenny to strike the words, "and otherwise," from the original indictment. In this motion defendants attacked the statutory language on its face: 1) It was "overbroad" because it prohibited conduct clearly protected by the First Amendment free speech guarantee and 2) It was vague because it made ordinary men guess at its meaning in violation of their rights not to be deprived of life, liberty and property without due process of law. (R. 9-27.)

Moreover, defendants filed a new motion to dismiss this time challenging the sufficiency of the indictment under Rule 7(c) of the Federal Rules of Criminal Procedure. Without an allegation referring to the statutory language, "force or violence or otherwise," defendants contended that the government had failed to state the essential elements of the offense charged. (R. 41-53.)

At a pre-trial hearing on this new indictment defendants came before a new trial judge, the Honorable Robert C. Belloni, Judge Kilkenny having been appointed in the meantime by President Nixon to the Court of Appeals for the Ninth Circuit. This time the trial judge ruled against both of defendants' pre-trial motions. (R. 86-87.)

At the trial defendants continued to maintain that "force or violence" were essential elements of the offense charged. Therefore, they submitted to Judge Belloni a requested jury instruction which required that the jury

find "force or violence" in order to find defendants guilty. (R. 159C.) On the second day of trial in a conference in chambers Judge Belloni informed defendants and counsel that he intended to give defendants' requested instruction on force and violence. (T. 213.) Thereafter Judge Belloni did instruct that force or violence was an essential element of the crimes charged in each count of the indictment. (R. 642-43.)

This instruction was an important one as Judge Belloni, himself, emphasized in his remarks to the jury: "I don't think we can truthfully call any act testified to as violent," and "The evidence here (on force) is in dispute . . ." (T. 655-56.) The importance of this instruction is also highlighted by the fact that the trial judge submitted to the jury the question of whether or not defendants could not be convicted because their acts were protected under the "free speech" and "petition for redress of grievances" guarantees of the First Amendment of the United States Constitution. (T. 649-53.)

Under such instructions the jury returned verdicts of guilty against the defendants on each of the three counts of the superseding indictment. Before the case was submitted to the jury defendants moved for a judgment of acquittal twice, once at the end of the government's case in chief and once at the conclusion of all of the evidence. Each time defendants renewed their pre-trial motions to dismiss. (T. 361, 593-94.) The pre-trial motions to dismiss were renewed after judgment but before sentence in a motion in arrest of judgment. (R. 128-33.) After denying this motion, the trial judge on September 2, 1970 sentenced each defendant to concurrent two year imprisonment terms on each count.

From this judgment defendants filed a timely appeal to the United States Court of Appeals for the Ninth Circuit. Defendants pressed several issues, only two of which are of importance in this petition. First, defendants maintained that the statute and indictment under which they had been convicted violated their rights under the First and Fifth Amendments of the United States Constitution, a contention that defendants had consistently made since the return of the original indictment against them. Second, they maintained that the indictment under which they had been convicted had failed to charge a crime, another contention that defendants had consistently made from the earliest opportunity.

Both of these contentions, along with all others, were rejected by a three member panel of the Court of Appeals in an opinion written by District Judge George H. Boldt sitting by designation. That panel rejected defendants' two claims as follows:

> "Where, as in the present case, defendant persuades the trial court to instruct that force and violence is an essential element for conviction by the jury, on appeal from conviction the defendant may not challenge the validity of the words "or otherwise" in the statute or urge error for failure to include an allegation of "force or violence" in the indictment."

The only authority cited in support of this conclusion was the following quote from *United States v. Raines*, 362 U.S. 17, 21 (1960):

> "'. . . (O)ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken

> as applying to other persons or other situations in which its application might be unconstitutional.' "

Defendants timely motion for a rehearing with a suggestion that it be held in banc was denied on September 16, 1970.

VI. Reasons Relied On For Allowance Of Writ

1. The decision of the Court of Appeals below that defendants had no right to challenge the constitutional validity of the statute under which they have been convicted conflicts in principle with numerous decisions of this court.

Although it is true that the general rule of constitutional adjudication requires the claimant to show that his acts were constitutionally protected, this is not the rule in cases where a statute has been attacked as unconstitutional on its face under the First Amendment free speech guarantee. This court has

> "consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with requisite narrow specificty." *Dombrowski v. Pfister*, 280 U.S. 479, 486 (1965).

Thus in cases involving free speech constitutional attacks on both federal and state statutes this court has examined defendants' claims in light of possible applications of the statutes to other persons in various fact situations. E.g., *United States v. Robel*, 389 U.S. 258 (1967) and *Kunz v.*

New York, 340 U.S. 290 (1951). See Note, "The First Amendment Overbreadth Doctrine," 83 Harv. L. Rev. 844, 844-46 (1970).

These cases have implicitly recognized that if the First Amendment could be invoked only by a claimant whose rights of free speech had been violated, then the constitutional vice of "overbroad" coverage, viz., the "chilling effect" on free speech rights, would not be effectively reached. See Note, "The First Amendment Overbreadth Doctrine," *supra*, 83 Harv. L. Rev. at 853-58. Rather the courts would be inclined to decide that such a claimant could not have been constitutionally convicted. This is precisely what happened to defendants' overbreadth challenge to this same statute in *United States v. Spock*, 416 F. 2d 165, 168-69, 173 n. 20 (1st Cir. 1969).

But defendants did not rely solely on the potential injury to others in their constitutional attack on this statute. The indictment under which they were convicted rested on the statutory language that defendants claimed was unconstitutional on its face. Any instructions to the trial jury limiting the government's case to one of "force or violence" cannot cure the injury suffered by defendants at the grand jury proceeding.

That the defendants were prejudiced before the grand jury is not open to doubt. For they had not engaged in the "hard-core" variety of conduct that could obviously have been constitutionally prohibited. The trial judge, himself, submitted to the trial jury the question of whether defendants' conduct was protected under the First Amendment. Thus defendants were not disentitled by their conduct from attacking the statute on its face. *Brown v.*

Louisiana, 383 U.S. 131, 147-48 (1966) (concurring opinion by Justice Brennan).

Nor was defendants' constitutional attack a frivolous one. They had been led to their First Amendment "overbreadth" challenge by a Court of Appeals for the Fifth Circuit opinion in a case arising under the predecessor to the statute under which they were charged. Under the old act that court found that Congress had specifically required proof of "force or violence" to make out an unlawful hindrance or interference. The judges unanimously concluded that Congress had deliberately chosen to so limit the statutory prohibition "in order to insure the fullest preservation of freedom of opinion and expression. . . ." *Bagley v. United States*, 136 F. 2d 567, 569 (5th Cir. 1943).

Defendants contended below that Congress reached too far when it added, in response to the *Bagley* case, the words, "or otherwise" and other expansive language. This court has long recognized that the guarantee of free speech in this country means that we must tolerate some hindrances and interferences with governmental action. See *Schenck v. United States*, 249 U.S. 47, 52 (1919). Thus this court recently found a state statute unconstitutionally overbroad because it reached "mere advocacy not distinguished from incitement to imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

The statute in this case prohibits all hindrances and all interferences of any degree. Therefore, one must conclude that there is substance to defendants' First Amendment constitutional challenge.

2. The question of whether or not the hindrance and

interference part of Section 462, Title 50 App., United States Code is unconstitutionally overbroad is an important question of federal law which has not been, but should be, settled by this court.

On December 9, 1967, the Attorney General of the United States and the National Director of Selective Services issued a joint statement to the press informing the public that the Department of Justice had established a special unit "to coordinate prompt prosecution of offenses against Selective Service laws and related statutes." This unit was to be assigned responsibility, among others, for the "prosecutions of violations of the Selective Service Law making it unlawful . . . knowingly to interfere *by force or violence or otherwise* with the administration of the System." (Emphasis added) 18 SELECTIVE SERVICE 1-2 (Jan. 1968).

It was this policy that led directly to the prosecution of Dr. Benjamin Spock and others on charges, among others, that they had conspired to "unlawfully, wilfully and knowingly hinder and interfere, by any means, with the administration of the Universal Military Training and Service Act." *United States v. Spock, supra,* 416 F. 2d at 168 and J. MITFORD, THE TRIAL OF DR. SPOCK, 53-56 (1969).

The Court of Appeals for the First Circuit, reversing the convictions of Dr. Spock and his co-defendants, made it clear that,

> ". . . the defendants were not to be prevented from vigorous criticism of the government's program merely because the natural consequences might be to interfere with it . . ." *Id.,* 416 F. 2d at 170.

Notwithstanding this setback in *Spock*, the government has continued to apply the "hindering and interfering" prohibition to the fullest extent allowed by the statutory language. As late as August 1969 the National Director, in a front-page story in the monthly selective service journal and under the headline: "State Directors Advised to Report Illegal Counseling", advised the state directors to discuss with the United States Attorneys in their states any "evidence that an identified person is . . . or has been interfering with the administration of the law . . ." 19 SELECTIVE SERVICE 1 (Aug. 1969). This advice did not pass unnoticed by those who provide counseling services for selective service registrants. See 2 COUNTERDRAFT 8 (Nov.-Dec. 1969).

The "chilling effect" that defendants claim will follow from a statute that prohibits all hindrances and interferences of whatever quantity and quality is a real one. It happened in *Spock*. It will happen again. The dangers of excessive administrative zeal here are no less than those found by this court in *Gutknecht v. United States*, 396 U.S. 295 (1970). As a matter of fact the use of the delinquency regulations in that case stemmed from the now famous October 1967 Hershey directive advising local boards to take away the deferments of those registrants who had engaged in "illegal activity which *interferes* with recruiting or causes refusal of duty in the military or naval forces." (Emphasis added. Text published in the New York Times, Nov. 9, 1967.) See *National Student Ass'n v. Hershey*, 412 F. 2d 1103 (D.C. Cir. 1969).

3. The decision of the Court of Appeals below that defendants had waived their right to challenge the sufficiency of the indictment conflicts in principle with the

decisions of this court and with a decision of the Court of Appeals for the First Circuit.

It has long been established by this court that a grand jury indictment cannot be amended by anyone but the grand jury. *Ex parte Bain*, 121 U.S. 1 (1886). Moreover, it has been well-established that this rule is not affected even if the defendant, himself, consents to the change, whether by amendment (see cases discussed and approved in *Ex parte Bain, supra*, 121 U.S. at 8-10), or by stipulation (*United States v. Norris*, 281 U.S. 619, 622-23 (1929)) or by bill of particulars. *Russell v. United States*, 369 U.S. 749, 769-71 (1962).

If defendant's consent to a direct change of a grand jury indictment would not constitute a waiver of his objections to the indictment's sufficiency, *a fortiori* defendants' request here for the "force and violence" instruction cannot constitute a waiver. Neither those instructions nor any evidence of force introduced at the trial can cure an otherwise defective indictment. *Hughes v. United States*, 338 F. 2d 651, on rehearing, 340 F. 2d 609, 610 (1st Cir. 1965).

The question of waiver is an important one for the administration of criminal justice in the federal courts. At every opportunity, on a motion to dismiss, on motions for judgment of acquittal, on a motion in arrest of judgment, defendants contended that the indictment below failed to charge an offense against the United States. By requesting a jury instruction requiring proof of force or violence defense counsel were simply seeking maximum legal protection for their clients. Because of this the Court of Appeals below found that defendants had waived their objections to the sufficiency of the indictment! This

ruling will undoubtedly cause defense counsel untold anxiety in future criminal cases.

Of equal importance, the Court of Appeals decision below cuts substantially into the protections afforded by the Fifth Amendment guarantee of a grand jury indictment. The trial judge's instructions on force and violence permitted defendants to have been tried and convicted on charges not included in the indictment. Such a variance in pleading and proof in an analogous case led this court to conclude unanimously in an opinion by Mr. Justice Black that "defendant's substantial rights to be tried only on charges presented on an indictment returned by a grand jury" had been destroyed. *Stirone v. United States*, 361 U.S. 212, 217 (1960).

It makes no difference that defendants were more favorably treated at the trial than they were in the grand jury proceedings. Had the indictment been limited to "force or violence" as were the instructions, the grand jury may not have indicted; more likely, the United States Attorney may have chosen not to prosecute. He certainly made every effort to avoid being limited to a "force or violence" indictment.

4. The question of whether the indictment in this case charged a crime is an important question of federal law which has not been, but should be, settled by this court.

The indictment in this case is based upon a form that has been used by the government in other cases. (R. 67) and *United States v. Spock, supra.* There is no reason to expect the government to discontinue use of this type of indictment. Thus there is every reason to expect that the

issue raised in this case will be raised again. And it is likely that conflicting opinions on the question will continue to be given in the future. Two trial judges disagreed in the case below. Defendants' rights and the rights of others ought not to be left to turn on the chance that he might appear before one trial judge or another.

The sufficiency of this indictment can be resolved only by an authoritative interpretation of the statute by this Court.

VII. Conclusion

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*

No. 25,051 vs.

DAVID GEORGE GWYTHER, *Appellant.*

UNITED STATES OF AMERICA, *Appellee,*

No. 25,052 vs.

KIP DALLEN MORGAN, *Appellant.*

[August 4, 1970]

Appeal from the United States District Court for the District of Oregon

Before: CHAMBERS and WRIGHT, Circuit Judges, and *BOLDT, District Judge.

BOLDT, District Judge.

The indictment in this case charged each defendant with two counts of violation of 50 App. U.S.C. 462[1] by hindering and interfering with the administration of the Military Selective Service Act by the local selective service board at Roseburg, Oregon on January 8, 1969 and

*Honorable George H. Boldt, United States District Judge, Western District of Washington, sitting by designation.

[1] "(a) . . . [A]ny person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of [the Military Selective Service Act] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished. . . ."

the local board at Eugene eight days later. In count III defendants were charged with conspiracy to commit the substantive offenses specified in counts I and II.

Defendants appeal from conviction on each of the three counts by jury verdict. Jurisdiction in the District Court: 18 U.S.C. 3231; this Court: 28 U.S.C. 1291.

The evidence shows, and there is no substantial evidence to the contrary, that by prearrangement defendants with several companies entered the premises occupied by each local board with the intent and purpose to conduct a mock trial of Board members and employees. Without permission and over objection by board personnel, defendants and their associates passed through a gate into an enclosed area containing desks and files where employees were working and from there pushed their way into the board hearing room. Defendants timed their arrival to coincide with a scheduled personal appearance of defendant Morgan at the Roseburg local board and with the scheduled appearance of John Platts at the Eugene local board when they knew Platts would not be present. On entering the hearing room defendants vehemently announced the selective service personnel were under arrest and would be summarily tried for "murder and other crimes against humanity." Then and there a six-page "indictment" was read aloud to the board members and employees by defendant Morgan acting as "prosecutor" with Gwyther assuming the role of "judge." Board members and employees were alarmed and apprehensive; conduct of board business was halted; it was impossible to proceed with board hearings scheduled at that time, i.e., a hearing for Morgan at Roseburg, and for Platts at Eugene; male and female employees were physically re-

strained, prevented from withdrawing and delayed in calling police.

The evidence amply supports the jury verdict finding the essential elements of each count proved beyond a reasonable doubt: Defendants in fact did substantially hinder and interfere[2] with the Roseburg board and the Eugene board in administering the Military Selective Service Act; in doing so, they used force and violence of speech and action; defendants intended to do what they did and they acted knowingly and wilfully; prior to the assault upon each selective service board, defendants and others conferred, planned and specifically intended to accomplish the acts later committed by them and various overt acts in furtherance of their agreed procedure were committed by defendants and others acting in concert with them.

The phrase "force or violence" was not included in the indictment on which defendants were tried and convicted. Despite this, counsel for defendants represented to the trial judge that the use of force and violence was an essential element of the substantive offenses charged and requested mandatory instructions to that effect which were given to the jury as proposed on behalf of defendants.

In plain, concise and definite language the indictment states the allegations of essential facts constituting the offenses charged. Rule 7, F.R.Cr.P.; *Wong Tai v. United States*, 273 U.S. 77 (1927).

---

[2]Each of the words "hinder" and "interfere" has such a clear, specific and well-known meaning as not to require more than use of the words themselves in a criminal statute. See District of Columbia v. Little, 339 U.S. 1 (1950); Powers v. McCullough, 140 N.W.2d 378. Webster's Third New International Dictionary, unabridged: "hinder" means to obstruct, hamper, block; "interfere" means to interpose, intervene, intermeddle.

Where, as in the present case, defendant persuades the trial court to instruct that force and violence is an essential element for conviction by the jury, on appeal from conviction the defendant may not challenge the validty of the words "or otherwise" in the statute or urge error for failure to include an allegation of "force or violence" in the indictment.

> ". . . [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960).

All other contentions of defendants have been examined, considered and found without merit.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff and Appellee,*

No. 25,051 vs. No. 25,052

DAVID GEORGE GWYTHER and KIP DALLEN MORGAN, *Appellants.*

[Filed Sept. 16, 1970, Wm. B. Luck, Clerk]

ORDER DENYING PETITION FOR REHEARING

Before: CHAMBERS and WRIGHT, Circuit Judges, and BOLDT, District Judge.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The entire court has been advised of the suggestion for a rehearing en banc and none has voted for it.

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

No. CR 69-13 v.

DAVID GEORGE GWYTHER and KIP DALLEN MORGAN, *Defendants.*

[Filed Feb. 7, 1969.]

INDICTMENT
[50 App. U.S.C. § 462]

THE GRAND JURY CHARGES:

COUNT I
[50 App. U.S.C. § 462]

On or about January 8, 1969, at Roseburg, Oregon, in the District of Oregon, DAVID GEORGE GWYTHER and KIP DALLEN MORGAN, defendants, did knowingly and wilfully hinder and interfere and attempt to do so by force and violence and otherwise with the administration of the Military Selective Service Act of 1967, and the rules and regulations made pursuant thereto, in that they, and each of them, entered the offices of Selective Service System Local Board No. 14, located at 725 S. E. Mosher Street, Roseburg, Oregon, and while there interrupted and disrupted official actions of Selective Service System

personnel and interrupted, restrained, and stopped a meeting and official action of this Local Board; in violation of Title 50 App., Section 462, United States Code.

COUNT II

[50 App. U.S.C. § 462]

On or about January 16, 1969, at Eugene, Oregon, in the District of Oregon, DAVID GEORGE GWYTHER and KIP DALLEN MORGAN, defendants, did knowingly and wilfully hinder and interfere and attempt to do so by force and violence and otherwise with the administration of the Military Selective Service Act of 1967, and the rules and regulations made pursuant thereto, in that they, and each of them, entered the offices of Selective Service System Local Board No. 13, located in the Empire Building, 1074 Willamette Street, Eugene, Oregon, and while there interrupted and disrupted official actions of Selective Service System personnel and interrupted, restrained, and stopped a meeting and official action of this Local Board; in violation of Title 50 App., Section 462, United States Code.

COUNT III

[50 App. U.S.C. § 462]

Beginning in or about January, 1969, and continuing until the date of this Indictment, the exact dates being unknown to the Grand Jurors, in the District of Oregon, defendants DAVID GEORGE GWYTHER and KIP DALLEN MORGAN and co-conspirators did unlawfully, wilfully and knowingly conspire and agree among themselves, and with each other, and with divers other persons whose names are to the Grand Jurors unknown, to com-

mit certain offenses against the United States, to-wit: to knowingly and wilfully violate Section 462 of Title 50 App., United States Code, and, more particularly, to knowingly and wilfully hinder and interfere and attempt to do so by force and violence and otherwise with the administration of the Military Selective Service Act of 1967, and the rules and regulations made pursuant thereto, as more fully described in Counts I and II of this Indictment, which are re-alleged and incorporated herein by reference; and these defendants, in pursuance of this conspiracy and to effect the objects thereof, did commit the following overt acts:

1. On January 8, 1969, at Roseburg, Oregon, in the District of Oregon, DAVID GEORGE GWYTHER and KIP DALLEN MORGAN did enter the offices of Selective Service System Local Board No. 14, located at 725 S. E. Mosher Street, Roseburg, Oregon, and while there interrupted and disrupted official actions of Selective Service System personnel and interrupted, restrained, and stopped a meeting and official action of this Local Board;

2. On January 16, 1969, at Eugene, Oregon, in the District of Oregon, DAVID GEORGE GWYTHER and KIP DALLEN MORGAN did enter the offices of Selective Service System Local Board No. 13, located in the Empire Building, 1074 Williamette Street, Eugene, Oregon, and while there interrupted and disrupted official actions of Selective Service System personnel and interrupted, restrained, and stopped a meeting and official action of this Local Board; in violation of Title 50 App., Section 462, United States Code.

Dated this 7th day of February, 1969.

A TRUE BILL.
/s/Carlyle D. Staab
Deputy Foreman

SIDNEY I. LEZAK
United States Attorney
District of Oregon

/s/ JACK G. COLLINS
First Assistant
United States Attorney

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

No. CR 69-42 (*sic*) vs.

DAVID GEORGE GWYTHER and KIP DALLEN MORGAN, *Defendants.*

March 18, 1969, Portland, Oregon
Tuesday at 3:30 p.m.

BEFORE: The Honorable John F. Kilkenny, Judge.

APPEARANCES:

Mr. Sidney Lezak, United States Attorney for Oregon, as Counsel for the Government.
Messrs. Nels Peterson and G. Bernard Fedde, Attorneys for Defendant Morgan.
Mr. Herbert W. Titus, Attorney for Defendant Gwyther.

TRANSCRIPT OF PROCEEDINGS

THE COURT: Counsel, I have read the memoranda on the respective motions to dismiss. I have a few questions that I want to ask of the Government.

Before we open up here, I would say this: That I'm personally satisfied that the 1965 act is Constitutional, the act as such, and I so hold.

That leaves for decision the specific fact on Section 462. Now, I have these questions, Mr. Lezak?

MR. LEZAK: Yes, Your Honor.

THE COURT: The charge in the indictment is that the defendants did knowingly, willfully hinder and interfere and attempt to do so by force and violence and otherwise.

With reference to the language "and otherwise", I must know in that it would have something to do with my decision, whether the Government is intending to offer evidence of anything under the phrase "and otherwise"?

MR. LEZAK: Yes, Your Honor. Yes. As a matter of fact, I will, to clear up the Government's position, defendant has moved for a Bill of Particulars asking for the particular regulations which the Government —

THE COURT: Are you speaking now of the regulations or are you speaking of the language "and otherwise"? We have two different things.

MR. LEZAK: I'm sorry. We are, the Government, does contend that acts of the defendants, other than those which would come under the definition of force and violence, did interfere and hinder the operation of the Government.

THE COURT: All right. I'm not asking you that. I'm asking the language of the "otherwise" portion. Should I treat that as surplusage or not? It is one or the other, as I view it. For the time being, this is not an absolute thing, but for the time being if you are relying on force and violence and not the language "and otherwise", which is in the disjunctive in the statute, or "otherwise", then I think I have one problem.

On the other hand, if you are also going to offer some evidence under "otherwise" I think I have another problem.

MR. LEZAK: Yes. The Government's evidence will show some acts of force and violence on the part of the defendants. It will also show other acts which would not be interpreted by the Court as being acts constituting force and violence. So, therefore, my assumption is that we are asking the Court to consider —

THE COURT: I'm going to strike it, anyway, in that I think it is surplusage here and I think the Government is just leading into a pitfall by having it there. So it's out, the "and otherwise" is completely out of the case.

MR. LEZAK: Very well.

THE COURT: It is surplusage. That leaves it now where we have a case where the Government will be offering evidence on force and violence.
That is, to hinder and interfere. It will be up to the Court to define force and violence.

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MR. LEZAK: Now, in striking the language "or other wise" from the indictment, I'm trying to —

THE COURT: I'll tell you this, Mr. Lezak, if you haven't force and violence you haven't anything period in my opinion because either the 'or otherwise" must be construed ejusdum generis going back to the force and violence or you haven't anything. If it's left that wide open, why —

MR. LEZAK: Unfortunately, Mr. Collins, who is more familiar with this than I am — I just got back to town yesterday — is not here. I know that the Berrigan case (phonetic), which is known as the Captajnville Nine case (phonetic) —

THE COURT: I'm familiar with it. That is not in point on this question.

MR. LEZAK: I see.

THE COURT: No.

MR. LEZAK: And I think the Court is probably aware of the fact that the statute was amended in 1948.

THE COURT: By the addition of the words, "or otherwise"?

MR. LEZAK: Yes. To take care of the ruling in the Bagley case and the impression that I have had in the reading I have done is that it was at least the intent of Congress to cover the problem raised by the Bagley case by providing that any hinderance or interference with the Board's activities, whether done by force or violence or otherwise, would be made illegal.

THE COURT: Well, if the "or otherwise" is in there, I wouldn't have much hesitancy in saying that we had a Constitutional problem of extreme dimensions.

MR. LEZAK: As I understand it, the Court will — I assume the Court will permit us to show the circumstances?

THE COURT: Oh, yes. If there is force and violence involved.

MR. LEZAK: We are going to be limited in terms of the sufficiency of the proof.

THE COURT: I don't see where you will be limited as to sufficiency of the proof. You will be limited so far as the instructions to the jury are concerned, there must be force and violence.

MR. LEZAK: All right.

* * * * * *

REPORTER'S CERTIFICATE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

No. CR 69-12 (*sic*) vs.

DAVID GEORGE GWYTHER and KIP DALLEN MORGAN, *Defendants.*

I, BRUCE E. JOHNSON, an Official Court Reporter of the above-entitled Court, do hereby certify that I reported in stenotypy the proceedings had in the above-entitled matter on March 18, 1969; that thereafter I caused a typewritten transcript to be prepared under my direction of said proceedings, so taken by me as aforesaid, and the foregoing transcript, pages 1 to 28, both inclusive, constitutes a full, true and correct transcript of said proceedings, so taken by me in stenotypy on said date, and of the whole thereof.

Dated at Portland, Oregon this 12th day of June, 1969.

Bruce E. Johnson
Official Court Reporter

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 857

DAVID GEORGE GWYTHER and KIP DALLEN MORGAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1970. A petition for rehearing was denied on September 16, 1970 (Pet. App. B). The

petition for a writ of certiorari was filed on October 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where the judge instructed the jury that it must find that petitioners' interference with the administration of the Selective Service was by force and violence to justify a conviction under 50 U.S.C. App. 462(a), petitioners may attack the statute as unconstitutional on its face for overbreadth because it contains a prohibition, not applied to them, on interference "otherwise" than by force and violence.

2. Whether the indictment, which alleged that petitioners interfered with the administration of the system by disrupting official action and stopping a meeting, was fatally defective for failing to allege that the interference was by force and violence, where the judge charged that proof of force and violence was necessary to conviction.

STATUTE INVOLVED

Section 12(a) of the Military Selective Service Act of 1967, as amended (50 U.S.C. App. (Supp. V) 462 (a)), provides in pertinent part:

> [A]ny person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title * * * or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses,

shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Oregon, petitioners were convicted of two counts of having knowingly and wilfully hindered and interfered with the administration of the Selective Service System in violation of 50 U.S.C. App. 462(a) and one count of conspiracy to commit the offense. They were sentenced to concurrent prison terms of two years. The court of appeals affirmed.

The indictment on which petitioners were tried charged, as to each substantive offense, that defendants "did knowingly and wilfully hinder and interfere" with the administration of the Selective Service Act in that they entered a particular draft board office and "while there interrupted and disrupted official actions of Selective Service System personnel and obstructed, restrained, and stopped a meeting and official action of this local Board." See Pet. App. 22-23.

The evidence, summarized in the opinion below (Pet. App. 18), showed that petitioners and others pushed their way into two different draft boards and occupied the premises to conduct mock trials of board members and employees. Employees of the draft board were physically restrained, prevented from withdrawing and delayed in calling the police.

At the request of petitioners, the judge charged the jury that it must find that the interference with the draft boards was by force or violence in order to convict petitioners.[1]

ARGUMENT

1. Despite the fact that the jury was instructed that it had to find force or violence to convict, petitioners attack the constitutionality of Section 12(a) on its face because the statute prohibits interference "otherwise" than by force or violence. The court below properly held that, in view of the instructions, the issue raised by petitioners is not presented by this case since the "or otherwise" clause was not applied to them. *United States* v. *Raines*, 362 U.S. 17. See, also, *Yates* v. *United States*, 354 U.S. 298; *Dennis* v. *United States*, 341 U.S. 494; Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 899-901, 918-923. The doctrine that a statute may be attacked on its face for overbreadth is inapplicable to cases such as this one where the part of the statute under attack is not involved at all.

2. Although the indictment did not allege that the interference was "by force or violence," it did set forth the specific acts with which defendants were charged. Petitioners, who themselves urged the court

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[1] A prior indictment had charged that petitioners had interfered with the administration of the system "by force and violence and otherwise." The district court struck the "and otherwise" language from the indictment (Pet. 5). The second indictment made no reference to "force and violence and otherwise" but was identical in all other respects.

to construe the indictment as charging interference only by force or violence and who were advised by the trial judge on the second day of trial that he would so instruct (See Pet. 6-7), were adequately apprised of the charges against them. They were thus able to prepare their defense and were protected against double jeopardy. See *United States* v. *Debrow*, 346 U.S. 374. The indictment, therefore, was sufficient.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

NOVEMBER 1970.

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